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May 7, 1982

Report of the Technology Transfer Intelligence
Committee Working Group on Intelligence Support
to the Export Control Enforcement Community
Regarding
the 1980 Final Report of the Interagency Export
Controls Working Group Subcommittee on Intelligence
Community Coordination and Communication

Participants

Commerce

Army

FBI

State

✓ CIA

Customs

Justice

NSA

DIA

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DOJ Review Completed

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Department of Justice



Office of Intelligence Policy and Review

Washington, D.C. 20530

MEMORANDUM FOR [REDACTED]

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Chairman

Technology Transfer Intelligence Committee

Report of the TTIC Working Group
Concerning Intelligence Support
to the Export Control Enforcement Agencies

Early this year, you formed this Working Group to determine how the intelligence agencies could better support the functions of the export control enforcement agencies. You directed that it begin by reviewing the September 1980 Intelligence Subcommittee Report to the "Keuch Committee" regarding "Intelligence Community Coordination and Communication with Enforcement Agencies." The group has completed this review and its comments and recommendations are stated in the following pages.

Introduction and Conclusions

As a general matter, it appears that most of the issues that were identified in the 1980 report have been or are being addressed in a spirit of cooperation and shared objectives. According to the agency representatives on this Working Group, there has been substantial progress and the major obstacles to intelligence-export control agency collaboration for the purpose of strengthening the export control system have been or are being removed or reduced. This has been accomplished because of two major factors. First, new personnel in a number of key positions have brought a fresh perspective and a renewed sense of unity to the process. Second, the proliferation of groups, committees and working groups and the development of numerous reports, studies and recommendations have thoroughly acquainted the various agencies and personnel involved with each other's legitimacy, functions, needs, objectives, procedures, capabilities, interests and problems.

Certainly, further improvements can be made in some areas. Overall, however, it is gratifying to those who have been dealing with this problem for three or four years that results seem to be appearing at last. Most of the procedural and organizational problems that were the center of attention in the 1980 report appear to be well on the way to resolution. Consequently, the focus for improving intelligence support to the export control agencies has shifted to implementing these reforms and participating fully in the various groups that have been created to deal with the distinct pieces of this effort.

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One of the most promising developments in terms of intelligence support to enforcement agencies is the reformation of the "Keuch Committee" itself. The Committee, now chaired by Assistant Attorney General Lowell Jensen, has turned away from general matters of policy and is concentrating more carefully on enforcement problems. The primary working group of this committee, led by John Martin and Joe Tafe of the DOJ Criminal Division, has the potential to become the most significant forum for coordinating enforcement and investigative efforts within the U.S. and drawing effectively upon appropriate intelligence data bases and support. This group brings the relevant enforcement and intelligence agency representatives together and is intended to apply the substantial policy structure that has been developed to specific cases. Through substantial participation in this group, the intelligence agencies have the opportunity to become directly acquainted with the current state of the enforcement effort and the intelligence needs of the enforcement agencies. The intelligence agencies also will be in a position to acquire and pursue significant items of information being developed by the enforcement agencies that will enhance the effectiveness of the intelligence effort in the long run. If intelligence-related issues develop in this forum, they may be brought back to the TTIC for appropriate consideration in an Intelligence Community setting.

The TTIC structure itself provides a forum for resolving intelligence issues of general concern, for consideration of specific matters with an intelligence aspect and for obtaining a common understanding of current developments in the export control-technology transfer area. This should improve the coherency and effectiveness of the intelligence support that is made available to the export control agencies.

Commerce's Advisory Committee on Export Policy makes determinations concerning whether particular exports should be licensed and what general policies should be applied by the U.S. The intelligence agencies are in a position to make substantial contributions to this group's understanding of the impact of particular exports and various policy alternatives.

State's EDAC Working Group II structure provides an important opportunity for intelligence, enforcement and foreign policy considerations to be discussed in the context of both general policy concerns and particular cases. Intelligence support here is essential for its value in identifying and assessing international enforcement problems and identifying cases that feature both domestic and international aspects. This group also provides an opportunity for the intelligence agencies to obtain useful information regarding current enforcement efforts and cases.

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The NSC Technology Transfer Coordinating Committee, chaired by Dr. Weiss, should serve as a valuable high level forum for national policy assessment and development. Since this is the only one of the several groups dealing with export controls that is chaired by a non-intelligence, non-enforcement representative, it is here that disparate political, foreign policy, intelligence and enforcement elements may be woven together. Substantial intelligence support to this group will result in better understanding of the threat, greater support for the efforts of the intelligence and enforcement agencies and more considered policy determinations.

In these formal structures and the working contacts that occur daily, intelligence support to the enforcement agencies is important in identifying threats and methods of operation, devising enforcement strategies and countermeasures, channeling resources and assessing effectiveness. This relationship need not be one-way, however, and the intelligence agencies should benefit also by deriving valuable information that will add to their understanding of the nature and amount of exports and losses, vulnerabilities of export controls to avoidance and diversion, methods of technology transfer acquisition, and effectiveness of U.S. and COCOM enforcement efforts. There is clearly some risk to the information, sources and methods of the intelligence agencies whenever a connection is established with law enforcement agencies. It is also clear, however, that substantial measures are available to protect these interests and that the risk is negligible in all but the most extreme, unforeseen circumstances.

Overview of the 1980 Report

The 1980 report described the then-existing "interface" between the intelligence and export control agencies in these dismal terms:

infrequent or poor communications; ineffective utilization of existing administrative channels; inexperience in dealing with each community's needs and priorities; and ignorance of opportunities for mutual assistance.

In seeking to identify the sources of this problem from the perspective of the intelligence agencies, the report centered on two major problems that were serving to impede the flow of "export control intelligence" (i.e., information collected by the intelligence agencies that may be relevant to enforcement of U.S. export controls).

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The first of these major problem areas related to the failure of the export control agencies to make their intelligence needs adequately known to the intelligence agencies and to organize themselves sufficiently to utilize such intelligence as was being provided. The consequence of this failing was that, while some export control intelligence was being acquired by the intelligence agencies, this effort was not focused or coordinated as well as might otherwise have been the case. Further, it was found that available information might not be provided through dissemination channels to the officials who might benefit most from its content, either because the intelligence agencies were not fully aware of export control agency requirements in the first instance or the export control agency intelligence liaison officials who received this information from the intelligence agencies were not aware of the needs of other components in their own agencies.

This problem area appears to have been the subject of much attention and some improvement. The export control agencies (Commerce, Customs, State, DOD) have indicated that they all have provided specific, detailed descriptions of their requirements to the intelligence agencies. Indeed, Customs claims to have "papered" the intelligence agencies with copies to ensure they reach the proper officials. Efforts are underway to refine these tasking requirements still further and the intelligence agencies should ensure that they are properly processed and implemented. It is difficult for the export control agencies to determine whether this has occurred since it is presumed that there will be some elapsed period of weeks or months before any meaningful change in information flow will result from enhanced priorities and new collection initiatives. As to internal administrative matters, the export control agencies seem to believe that access, dissemination and security obstacles are being overcome and that this type of impediment to information flow is much less of a problem now than it has been in the past.

The second major problem area identified in the 1980 report involved three types of obstacles to full and free collection and dissemination of information by the intelligence agencies -- protection of intelligence sources and methods, regulatory limitations concerning information identifying U.S. persons (citizens, resident aliens, organizations and corporations) and statutory and policy inhibitions regarding participation in law enforcement activities. These inhibitions were probably the result of an understandable sense of caution bred by the intelligence agencies' experiences during the past eight years. There appears to have been some, but slightly less, progress in this area. Such lag as may exist here may be assigned to the fact that these are problems of shading and perception, rather than organization and procedure. There seems to be a growing

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understanding in the intelligence agencies that there are effective means and sincere intentions to protect intelligence sources and methods. The export control agencies would certainly be defeating their own interests in receiving continued intelligence support were they to undertake to mishandle intelligence information or ignore legitimate concerns for intelligence sources and methods in a systematic, deliberate fashion. At the same time, the intelligence agencies appear to recognize that such risks to the security of their information as do exist should be evaluated and confronted whenever possible because of the substantial national interest in improving export control enforcement. These developments appear to be slowly reducing the barriers to dissemination. An important element in further reducing concerns in this area will be final agreement between the intelligence and enforcement agencies concerning procedures for the handling of intelligence information that is provided to enforcement officials.

As for the statutory and regulatory limitations relating to information concerning U.S. persons that may be of value to the export control agencies, it appears that further education and experience will demonstrate to the intelligence agencies that such information may be disseminated in accordance with those authorities. So long as the information relating to export control matters has value as foreign intelligence (i.e., it relates to any capabilities, intentions or activities of any foreign power, organization or person) or as counterintelligence (i.e., it is gathered to protect against any espionage or other clandestine intelligence activity conducted for or on behalf of any foreign power, organization or person) it may be collected, retained and disseminated by the intelligence agencies. Any U.S. person identity that is lawfully collected in this way may be retained and disseminated so long as it is adjudged to be necessary to understand or evaluate the importance of the intelligence information in which it appears. Further, if information is acquired by the intelligence agencies in the course of their activities that constitutes evidence of a possible violation by any U.S. person of U.S. export control laws, not only may it be retained and disseminated to appropriate law enforcement officials, but such action is mandatory in accordance with specific guidelines that have been developed for this purpose.

Recently, discussions have been undertaken with the DCI Human Resources Committee to clarify the understanding of that group as to the nature of the export control problem and the extent of the available collection authorities. Further efforts by appropriate legal and operational officials may be required

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to drive this message home. The new Executive Order (12333) and the ongoing revision of the various procedures that govern intelligence activities may help to clarify these matters further.

The third concern, involvement in law enforcement functions, is also an issue that requires resolution through education and experience. The Office of Intelligence Policy at the Justice Department produced a legal opinion for the Keuch Committee in November 1980 regarding the legality of CIA and NSA collection and dissemination to enforcement officials of information concerning efforts to export goods and technology illegally. The general conclusion of that memorandum was that the intelligence agencies may collect such information, even in response to specific requests from the enforcement agencies, so long as they first determine that they would be authorized to collect it for legitimate foreign intelligence and counter-intelligence purposes. In other words, information of foreign intelligence and counterintelligence value may be collected and disseminated whether at the initiative of the intelligence agencies or at the request of the export control agencies and whether in response to generalized or specific requirements.

There would be substantial questions raised by any continuing, direct and intentional involvement of the intelligence agencies in a specific law enforcement investigation to acquire law enforcement information of little or no intelligence value. Merely collecting and providing law enforcement agencies with intelligence information that may be of interest or use to them in performing their functions, as well as incidentally acquired law enforcement information, is a different matter entirely. The new Executive Order (12333) and ongoing revision of the intelligence procedures should also clarify this situation further.

Review of Specific Findings from the 1980 Report

The 1980 report also discussed the two major problem areas described above, and a variety of related problems, in more detail and recommended various remedial actions. In order to clarify the context and the relationship between the various problems, they were grouped generally under the three stages of the export control enforcement process -- the pre-investigative (i.e., information collection, analysis and collation) stage; the investigative (i.e., operational, action-oriented) stage; and the prosecutive (i.e., administrative or criminal proceeding) stage.

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The remainder of this paper describes the problems and remedies that were identified in the 1980 report, what steps have been taken in each area and what further action may be desirable. The problems have not been grouped into the pre-investigative, investigative and prosecutive categories used in the 1980 report. That framework was avoided in order to reduce repetition and to facilitate discussing similar problems under a single heading even though they may span the range of enforcement activities and differ slightly in intensity at each stage. The statements of the Problem and the Remedy that follow are paraphrases of the 1980 Report. The Comment section is the current view of this Committee.

1. Export Control Agencies Have Not Advised Intelligence Agencies of Their Intelligence Collection Requirements.

Problem. The export control agencies (except for the Department of Energy) have not systematically advised the intelligence agencies of their specific needs for foreign intelligence information, of the controlled equipment and technology that is of greatest concern to them, or of the specific addressees within the export control agencies that should receive intelligence that is collected.

Remedies. Each export control agency should prepare and provide to the intelligence agencies a composite list of its intelligence needs and specific offices that require specific types of information for the performance of their functions.

Comment. The export control agencies report that they have made their needs known to the intelligence agencies and are satisfied that they are receiving useful foreign intelligence. There is some concern that their requirements may not have been directed to the appropriate implementing offices in the intelligence agencies and may not have resulted in any real change in collection efforts. This is the responsibility of the intelligence agencies since it is obvious that the export control agencies cannot determine whether they are receiving all available intelligence of this nature. Consequently, the intelligence agencies should determine whether and to what extent the export control agencies' requirements have been received in the proper components and are being acted upon. The proper forum for this may be the subcommittee of TTIC that is engaged in existing statements of requirements and that includes a Commerce representative. Any deficiencies in these requirements should be pointed out to the export control agencies

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which should pursue appropriate clarification and implementation by the intelligence agencies. The export control agencies should also continue to familiarize themselves with the capabilities of the intelligence agencies so as to facilitate this process.

Intelligence that is provided by the intelligence agencies is usually disseminated to an intelligence liaison office at the various export control agencies. In some cases, these offices may not be providing appropriate access to such information and components of the export control agencies that feel they may not be receiving as much intelligence as they would like should first check with their liaison office to ensure they are receiving all the information of interest that is disseminated to their agency. These liaison offices should be made fully aware of the needs of specific offices.

2. Intelligence Agencies Fear Export Control Agencies Will Not Protect Intelligence Sources and Methods.

Problem. The Intelligence Community is concerned that dissemination of intelligence to the export control agencies, particularly to non-intelligence components, will lead to investigative action that will result in the exposure of intelligence sources and methods. The fear is that such disclosures may result in the loss of sources and methods that provide not only information relating to export controls and technology transfer but also other types of foreign intelligence information that may, in some cases, be of much greater significance to the national security.

Remedy. The intelligence and export control agencies should develop a general, comprehensive agreement providing for coordination and consultation when foreign intelligence information forms the basis for, or is to be used in, export control investigations.

Comment. There appears to have been a marked increase in sensitivity to this problem over the past two years. For example, the State Department's Economic Defense Advisory Committee Working Group II is now routinely seeking clearance from the intelligence agencies before taking unilateral or COCOM initiatives based upon intelligence information. More generally, a comprehensive, detailed agreement that would govern the handling and use of foreign intelligence information by the export control agencies has been under development for over a year. The delay resulted from the requirement to develop new

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procedures for the reporting of evidence of crimes to law enforcement officials by the intelligence agencies under Executive Order 12333 and the fact that these procedures, while not identical, would in many ways determine the form and content of several key provisions of the export control intelligence agreement. The crimes reporting procedures are now in place and CIA has recently circulated a new draft of the agreement for review and comment. Consequently, the agreement may be finalized in the near future.

3. Intelligence Agencies Do Not Feel Free to Disseminate Intelligence Concerning U.S. Persons.

Problem. The intelligence agencies are properly concerned, but may be needlessly hesitant, regarding compliance with procedures governing the collection and dissemination of information concerning United States persons. While these procedures do place real limits on the collection and dissemination of such information by these agencies, misunderstandings or lack of knowledge of their content may have resulted in unrealistic perceptions of the extent of these limitations. Generally, information concerning export controls and technology transfers may be collected and disseminated to the export control agencies even where it involves U.S. persons, when it constitutes foreign intelligence or counterintelligence. Specific guidelines also provide for the dissemination to appropriate law enforcement authorities of incidentally acquired evidence (which need not be proof) of a possible violation of U.S. export control laws.

Remedy. The legal components of each intelligence agency and, where appropriate, the Department of Justice should be consulted and continue to provide guidance concerning the nature and limits of the relevant guidelines.

Comment. To the extent there may be such inhibitions, they result from a misunderstanding of the actual content of the procedures and require further training and experience. The intelligence agencies are undertaking various types of initiatives to familiarize their personnel with current authorities. Nevertheless, it cannot be said that there are no limits on collection and dissemination in this area. Revised procedures are being developed to implement Executive Order 12333. They will be simpler in both form and content and will recognize the greater degree of discretion and flexibility granted by that order as compared to its predecessor (E.O. 12036).

Export control agencies should not hesitate to request the identities of U.S. persons where they have been

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deleted from intelligence reports and are needed to fulfill authorized functions, and legal components of the intelligence agencies should be consulted where there are questions in this regard. We are not aware of cases where the export control agencies have requested such information and been denied.

4. The Intelligence Agencies are Reluctant to Become Involved in Law Enforcement Activities.

Problem. There is a degree of reluctance within the intelligence agencies concerning the legality and propriety of becoming associated with activities that have a law enforcement aspect to them. Intelligence agencies are not generally permitted to collect, store or disseminate information for law enforcement purposes. Moreover, there are statutory limits on direct involvement in law enforcement activities. Thus, while intelligence agencies have not shown reluctance in reporting incidentally-acquired information indicating possible violations of law, requests for information in connection with an ongoing law enforcement investigation raise questions that stem from the basic authorities and functions of the intelligence agencies.

Remedy. The export control agencies must become better informed regarding the necessity for the intelligence agencies to distinguish between providing a law enforcement entity with information that is collected as foreign intelligence or incidentally in the course of such an effort, and collecting information in response to tasking with the sole or primary purpose of obtaining information for a specific law enforcement proceeding or case. The intelligence agencies should seek appropriate legal review by their own legal components and, where necessary, the Justice Department to ensure that collection tasking requirements received from the export control agencies are lawful under relevant provisions of law, Executive Order 12333 and its implementing procedures. In addition, to the extent there are real limits on the degree to which the intelligence agencies may collect law enforcement information, the export control agencies should increase their own investigative and liaison activities abroad.

Comment. This is a problem that can be ameliorated by better understanding and increased education. However, so long as the foreign intelligence and law enforcement communities remain distinct, there will continue to be areas of uncertainty.

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Intelligence agency employees in the field must be advised that there is no absolute bar on collection of information that has foreign intelligence or counter-intelligence value merely because it relates to technology transfer or violations of U.S. export controls by, to, or through foreign persons, entities or governments even where a U.S. person or corporation or a law enforcement interest are involved. Since the heightened emphasis on satisfying collection requirements concerning technology transfer and export controls is relatively recent, there is no standard by which to measure the extent to which such concerns may act as a general inhibition on collectors. Neither has the law enforcement/intelligence distinction been addressed in any specific way since, as far as can be determined at this time, there has yet to be an instance where the export control agencies have tasked the intelligence agencies to collect information directly relating to a particular ongoing investigation or violation of U.S. export controls.

The Office of Intelligence Policy in the Justice Department produced a legal opinion in November 1980 that explained in general terms the extent of the intelligence agencies' authorities in this regard and concluded that foreign intelligence and counter-intelligence related to technology transfer and violations of U.S. export controls may be collected and disseminated even at the specific request of the export control agencies. If it is thought that this would be helpful, it may be advisable to send a copy or synopsis of that opinion to relevant field elements.

5. Security Controls Limit Access by Export Control Personnel to Intelligence Information.

Problem. Due to a lack of communication, the export control agencies are unaware of the special intelligence clearances and dissemination and handling practices required by the intelligence agencies. As a result, enforcement officials within an export control agency may not possess the requisite special clearances for access to certain foreign intelligence information and may not even be aware that the information exists.

Remedy. Intelligence agency security requirements, including procedures for requesting the downgrading of the classification of specific reports, should be made known to export control officials, and the intelligence community should allot all export control organizations an appropriate number of special security billets.

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Department of Commerce. However, appropriately upgraded security clearances are being requested by Commerce and this problem is being resolved.

6. Export Control Agencies Do Not Share Intelligence With the Intelligence Agencies.

Problem. Information with intelligence value has not been provided to the intelligence agencies by the export control agencies in any systematic fashion. The intelligence agencies have not advised the export control agencies of their needs for intelligence and investigative information that could be useful in understanding how intelligence may be used by the export control agencies, in threat or capabilities analyses, or in evaluating the value and reliability of sources.

Remedy. The intelligence agencies should provide the export control agencies with a composite list of export control related collection requirements and effective guidance for reporting such information as is collected. In addition, the export control agencies should facilitate access by the intelligence agencies to their storage and retrieval systems so that better use can be made of existing data bases. Where necessary as a result of this effort, requirements for additional resources should be identified.

Comment. The intelligence agencies have informed the export control agencies of their requirements and some information has been exchanged as a result. With respect to access to data bases, the Department of Commerce is studying relevant issues after a year-long pilot project with CIA that proved to be very successful. Customs has no foreign intelligence in its data bases but does have such information in its intelligence and investigative files. Both Commerce and Customs may have investigative or other relevant information that may not appear on its face to be "foreign intelligence" but that would be very useful if shared with the intelligence agencies because it would indicate the nature and extent of technology acquisitions from the U.S. by foreign powers.

7. Export Control Agencies Do Not Share Export Control Information With the Intelligence Agencies.

Problem. The export control agencies believe that several legal issues must be resolved before they can disseminate information acquired as part of their export control responsibilities to the intelligence agencies. In particular, the Secretary of Commerce may have to determine that section 12(c) of the Export Administration Act does not prohibit the dissemination of information to other federal agencies engaged in intelligence and law enforcement functions and that withholding such

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information to other federal agencies engaged in intelligence and law enforcement functions and that withholding such information from them is contrary to the national interest. A pilot program for routine sharing of information with the CIA was approved to determine whether providing such access would be worthwhile. In addition, there was concern that the Privacy Act might restrict the sharing of information concerning U.S. persons.

Remedy. The Justice Department should be requested to analyze any perceived legal limitations to determine whether the export control agencies may alter their dissemination practices. The pilot program established by Commerce for CIA should become a permanent program and extend to other intelligence agencies. The export control agencies should determine whether the Privacy Act imposes any limitations on their sharing of information with the intelligence agencies and whether revised routine use statements would alleviate any such problems. If necessary, legislative amendments to existing statutes should be developed.

Comment. In August 1981, the Office of Legal Counsel in the Department of Justice rendered a legal opinion on the scope of the confidentiality clause of section 12(c) of the Export Administration Act concluding, in summary, that this provision did not bar access by these other federal agencies and did not, except in certain limited circumstances, require any determination by the Secretary. Nevertheless, this section remained a problem until recently when Commerce and Customs reached an accommodation concerning access for purposes of Operation Exodus. In order to institutionalize the Justice opinion, however, other agencies should continue discussions that are now underway with Commerce to reach more permanent and generalized agreements. TTIC may wish to explore whether it is possible, and whether this is an appropriate time, to obtain a single, uniform agreement for the intelligence agencies. The CIA proposal that the pilot project be continued and extended to all the intelligence agencies also should be pursued by TTIC.

8. Export Control Agencies Fear Intelligence Agencies Will Not Protect Export Control Sources and Methods.

Problem. The export control agencies also have concerns about the protection of their sensitive sources and methods that could be jeopardized through the unauthorized disclosure of information disseminated to the intelligence agencies. In particular, approaches to foreign officials can compromise export control sources and methods and hinder investigative efforts unless these actions are first coordinated with the originating agency.

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Remedy. Sensitive information provided to intelligence or foreign policy agencies by export control agencies should not be disclosed to foreign officials in the absence of consultation with the originating agency. Export control agencies should utilize a designator, such as "Originator Controlled," to identify and control this type of sensitive information.

Comment. There has been little indication that this is a real problem. This may be due to the limited amount of information that the export control agencies have provided to the intelligence agencies in the past. However, if there is such a problem it may be resolved by continued cooperation and consultation as has been illustrated in the case of similar fear for the integrity of intelligence sources and methods.

9. Export Control Agencies Are Reluctant to Share Investigative Information With the Intelligence Agencies.

Problem. Ethical and/or regulatory inhibitions may serve to prevent dissemination to the intelligence agencies by the export control agencies of information developed for evidentiary or background purposes during a criminal investigation.

Remedy. The export control agencies and the Department of Justice should develop procedures for disseminating specific investigative information to the intelligence agencies when it relates to the credibility or reliability of intelligence sources and methods or contains information of foreign intelligence or counterintelligence value. The intelligence agencies should be alerted to the potential foreign intelligence involvement whenever an export control violation is discovered that involves a critical technology or a foreign recipient that poses a threat to U.S. national security.

Comment. Aside from the lingering problems described above relating to the application of section 12(c) of the Export Administration Act, the export control agencies are presently experiencing little difficulty in sharing investigative information with the intelligence agencies where it has foreign intelligence or counterintelligence value.

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In conclusion, it appears that the vast bulk of the problems that existed in late 1980 have been resolved and that the intelligence and export control agencies are now working much more closely together to achieve a common objective and to resolve as many of the vestigial issues as still remain. These developments are due in large part to a turnover of key personnel and to the fact that "familiarity breeds content." Most institutional and policy-related problems have been identified and generalized progress is being made in these areas. The remaining problems are informational and implementation-related and require time and persistence for their resolution.

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